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TO: Eminent Domain Subcommittee of the Environmental Quality Council

FROM: Greg Petesch *GP*

RE: Necessity and Public Interest in Eminent Domain Proceedings

The Subcommittee has asked for information concerning how *necessity* and *public interest* are determined in eminent domain proceedings. Neither of these terms is specifically defined in Title 70, chapter 30, MCA, governing eminent domain. Both terms are referred to in section 70-30-111, MCA. That section enumerates the items on which the condemnor must introduce evidence in order to be allowed to exercise the power of eminent domain to take property.

Section 70-30-111, MCA, provides that before property can be taken by eminent domain, the condemnor must show, by a preponderance of the evidence, that the *public interest* requires the taking based on the following:

- (1) that the use is authorized by law;
- (2) that the taking is *necessary* for the use;
- (3) if already appropriated to a public use, that the proposed public use is a *more necessary* public use; and
- (4) that an effort was made to obtain the property sought to be taken by a written offer that was refused by the property owner.

The requirement of section 70-30-111(1), MCA, is easily met by introducing evidence that the type of project is a public use listed in section 70-30-102, MCA, or is specifically designated as a public use in another statute. The requirement of section 70-30-111(4), MCA, is easily met by introducing into evidence a written document in which an offer to buy the property or interest in

property is made. The rejection of the offer is easily established by either a written document or testimony. The requirements of subsections (1) and (4) of section 70-30-111, MCA, are required to be established in every eminent domain proceeding and are so straightforward that they are virtually beyond reasonable dispute. The other element that is required to be established in every eminent domain proceeding is that the taking of the property or the interest in property is *necessary* for the statutorily determined public use. That requirement, contained in section 70-30-111(2), MCA, is the item that is almost always subject to dispute. The element contained in section 70-30-111(3), MCA, is not required to be established in every eminent domain proceeding. It is only required to be established if the property or interest in property is already being used for a statutorily authorized public use. If the property is already being used for a public use, then the condemnor is required to establish that the proposed public use is *more necessary* than the existing public use.

Because the determination of whether the taking of the property or the interest in property is *necessary* for the statutorily determined public use is not as susceptible to easy determination as the other required elements of section 70-30-111, MCA, it has been subject to a great deal of litigation. There has not been a great deal of litigation concerning whether a proposed taking of property is in the *public interest*. The explanation for the lack of litigation concerning the *public interest* issue is contained in the language of section 70-30-111, MCA. That section provides that the *public interest* is established by introducing sufficient evidence on the three required items, only one of which, *necessity*, is usually even susceptible to dispute. However, section 70-30-206(2), MCA, provides that if the District Court judge hearing a condemnation case concludes, based upon the evidence presented, that the *public interest* requires the taking of the property and that the condemnor has met the burden of proof under section 70-30-111, MCA, the judge shall enter a preliminary condemnation order allowing the condemnation to proceed. The additional *public interest* requirement contained in section 70-30-206(2), MCA, will be discussed later in this paper. The other section that is the subject of dispute in eminent domain proceedings is section 70-30-110, MCA. That section requires that the District Court must also determine whether a proposed condemnation is located in the manner that will be most compatible with the greatest public good and the least private injury. That question is almost always a siting or location issue that arises after a taking of property has been found *necessary* for a specific public use.

With this general background in mind, I will examine a series of cases to demonstrate how the determination of *necessity* is made. The terms *necessary* and *necessity* are used for the same specific concept. The case of Montana Power Company v. Bokma, 153 Mont. 390, 457 P.2d 769 (1969), involving the taking of property for an electric power line, contains a good general overview of potential issues in eminent domain proceedings. Bokma contains a discussion of public use, the *necessity* for a taking, how the issue of greatest public good and least private injury is addressed, and due process.

While the Legislature is solely responsible for determining whether a use is a *public use* and is therefore authorized by law, the Judicial Branch, as provided in sections 70-30-111 and 70-30-206(2), MCA, is responsible for determining the issues of whether a taking is *necessary* and in the *public interest*. The Montana Supreme Court has construed the District Court's role under section 70-30-111, MCA, as that of finding whether or not the proposed taking is *necessary* to the public use under the circumstances of the individual case. Bokma. In State Highway Commission v. Crossen-Nissen Company, 145 Mont. 251, 400 P.2d 283 (1965), the Court rephrased the District Court's role as that of determining whether the particular property to be taken is reasonably requisite and proper for the accomplishment of the purpose for which the property is sought under the particular circumstances of each case. That rephrased role is based upon a long series of cases.

One of the earliest and best discussions of the concept of *necessity* was contained in a case in which a railroad was seeking to condemn land for a spur line. In Northern Pacific Railway Company v. McAdow, 44 Mont. 547, 121 P. 473 (1912), Chief Justice Brantly determined that the term *necessary* is used advisedly. The Chief Justice discussed the holding in Butte, Anaconda & Pacific Railway Company v. The Montana Union Railway Company, 16 Mont. 504 (1895), in which the Montana Supreme Court adopted a *necessity* test from Alabama and rejected an *absolute necessity* test adopted in Pennsylvania. The Alabama test provided that the term does not mean that there is an absolute or indispensable *necessity*. Chief Justice Brantly reaffirmed the Butte, Anaconda & Pacific determination that, generally, *necessary* means reasonable, requisite, and proper for the accomplishment of the end in view under the particular circumstances of the case. The fact that the taking of a particular piece of property would promote convenience and enhance the profits of the business of the railroad company was not alone a sufficient reason for permitting a taking. Convenience, economy, expedition, and *necessity* for facilities for competition may be inducing considerations because they all contribute indirectly to efficient service, but a corporation may not condemn property on the sole grounds that it may save expenses or add to the profits of the business. The determination that *necessary* means reasonable, requisite, and proper for the accomplishment of the end in view under the particular circumstances of the case has been scrupulously followed by the Montana courts.

Although the phrase "reasonable, requisite, and proper" has not been defined, the plain meaning of the phrase indicates that the condemnor is required to introduce evidence showing that the proposed taking is sensible, is required by the specific circumstances of the proposed project, and is suitable to the specific purpose or specific conditions of the project. With that explanation of *necessity* in mind, I will examine how the evidentiary determination has been made in specific instances.

In City of Missoula v. Mountain Water Company, 228 Mont. 404, 743 P.2d 590 (1987), the City attempted to take a water supply and a privately owned water system by eminent domain. The City passed an ordinance and a resolution authorizing the taking of the water supply and water

system. The City contended that the *necessity* for the taking was conclusively presumed based upon the ordinance and resolution. The District Court disagreed, and the Supreme Court upheld the District Court. The Supreme Court reaffirmed that *necessary* as used in section 70-30-111, MCA, means a reasonable, requisite, and proper means to accomplish the improvement. The Supreme Court relied on State ex rel. Smart v. City of Big Timber, 165 Mont. 328, 528 P.2d 688 (1974), to illustrate the wide range of considerations that are used in determining whether a proposed public use is more necessary than the present use. The District Court made detailed findings listing the reasons for concluding that the City did not prove that it was *necessary* to acquire the water system. The findings included the effect on Mountain Water employees, the effect on public savings on rates and charges, the effect on cooperation between the City and the company, and the effect of having the company's home office in Missoula. The Supreme Court found that the District Court had erred in excluding evidence concerning profit, the out-of-state ownership of Mountain Water, and the votes of the people and the City Council. The Supreme Court determined that the evidence concerning private versus public ownership was pertinent to determining whether the *public interest* required the taking under section 70-30-111, MCA, as broadly drafted and defined. The Supreme Court held that because section 70-30-111, MCA, gives the District Court the power to determine whether a taking is *necessary*, the votes by the people and the City Council could not be finally dispositive of the issue of *necessity*. The Supreme Court determined that the votes had to be considered and weighed with other factors in determining the *necessity* of the taking. The Supreme Court expressed regret that section 70-30-111, MCA, does not set forth all of the issues that are appropriate for consideration on the *necessity* for a taking or the weight to be given to the various factors. The Supreme Court did point out that the City has the burden of proving that the taking was *necessary* by a preponderance of the evidence. On remand, the District Court again concluded that the City had failed to prove the *necessity* for the taking. In a second appeal, in City of Missoula v. Mountain Water Company, 236 Mont. 442, 771 P.2d 103 (1989), the Supreme Court upheld the District Court determination. In that case, many additional offers of evidence by the City were precluded by the law of the case.

In Lincoln/Lewis & Clark County Sewer District v. Bossing, 215 Mont. 235, 696 P.2d 989 (1985), concerning an attempt to extend a sewer system, the Montana Supreme Court reconciled the holdings in City of Helena v. DeWolf, 162 Mont. 57, 508 P.2d 122 (1973), and State Highway Commission v. Yost Farm Company, 142 Mont. 239, 384 P.2d 277 (1963). The Supreme Court stated that once the condemnor has introduced sufficient evidence to establish *necessity*, the burden shifts to the person opposing the taking to show by clear and convincing evidence that the condemnor's action is excessive or arbitrary. In Bossing, the condemnor failed to show *necessity* because the condemnor failed to establish a reasonable present need or even a need in the reasonably foreseeable future to connect Bossing to the sewer project. The Court also provided an example involving an improvement. When the location of an improvement is chosen based on the expertise and detailed consideration of the condemnor and evidence concerning that consideration is introduced at the hearing, the condemnor's choice may be

overturned if the opposing party shows that the condemnor failed to consider the least private injury between routes that are equal in terms of public good.

In certain instances, the Legislature has granted another governmental entity the power of determining the *necessity* for the exercise of the power of eminent domain. In those instances, the finding is a political decision that will not be overturned by the court absent proof of arbitrariness established by clear and convincing evidence. See Montana Power Company v. Fondren, 226 Mont. 500, 737 P.2d 1138 (1987), and City of Bozeman v. Vaniman, 264 Mont. 76, 869 P.2d 790 (1993).

Section 60-4-103, MCA, provides for a showing similar to that required in section 70-30-111, MCA, for a state highway project. However, once the Department of Transportation adopts an order under section 60-4-104(2), MCA, subsection (3) of that section provides that the order creates a disputable presumption that there is a public *necessity* for the project, that the taking is *necessary* for the project, and that the project is planned or located in a manner compatible with the greatest public good and the least private injury. In a case involving a frontage road, evidence showing that all associated cost differential in routes was a direct result of the Department's 4-year delay in addressing potential routing problems made the Department's action arbitrary. State v. Standley Brothers, 215 Mont. 475, 699 P.2d 60 (1985).

In Fondren, involving an electric transmission line, the Montana Supreme Court discussed the relationship between the Montana Major Facility Siting Act, Title 75, chapter 20, MCA, and *necessity* under section 70-30-111, MCA. In that case, the dispute between the parties centered on whether the District Court had jurisdiction to determine whether the taking of Fondren's property was *necessary* to the public use, an electrical energy transmission line, because *necessity* for the transmission line and its location had been determined in administrative proceedings under the siting act. In analyzing the issue, the Montana Supreme Court looked to other jurisdictions that had similar statutory schemes. The general rule in those jurisdictions is that when the Legislature has delegated the power of determining the *necessity* of exercising the power of eminent domain to a private corporation or administrative agency, the corporation's or agency's determination of *necessity* is a political decision that is not subject to judicial review. Once a certificate has been issued under the siting act, an aggrieved party may seek judicial review of the issuance of the certificate under section 75-20-406, MCA. Once the certificate has survived any challenges, the certificate holder can commence acquiring property. If condemnation is required, the condemnor must file a complaint alleging the necessary facts under section 70-30-111, MCA, including that the taking is *necessary* for the construction of the facility. In sections 75-20-205 (now repealed) and 75-20-407, MCA, the Legislature had specifically restricted a court's jurisdiction, in eminent domain proceedings, to hear challenges to the *necessity* of taking private property when the property is taken in compliance with the siting act. The Supreme Court cautioned that the condemnor does not have free rein in the eminent domain proceeding. The condemnor must still allege the facts required to be found under section

70-30-111, MCA. However, the preponderance of the evidence is satisfied by appending to the eminent domain complaint the certificate of environmental compatibility and public need and the administrative body's findings of fact, opinion, decision, order, and recommendations.

The cases that I have discussed all indicate that the District Court will consider a wide variety of evidence on the issue of whether a taking is *necessary* for a public use. The District Court must find that the condemnor has offered a preponderance of the evidence establishing that a particular property proposed to be taken is reasonably requisite and proper for the accomplishment of the purpose for which the property is sought under the particular circumstances of each case. The specific evidence introduced is left to the condemnor and the condemnee. The Montana Supreme Court has provided wide latitude in allowing evidence to be offered. The District Court must determine the weight to be given to the various evidence and determine if the condemnor has introduced a preponderance of the evidence.

The fourth factor listed in section 70-30-111, MCA, is the question of whether a proposed use is *more necessary* than an existing public use. This issue, which is not present in every condemnation case, was addressed in Cocanougher v. Zeigler, 112 Mont. 76, 112 P.2d 1058 (1941). In that case, Cocanougher sought to condemn a right-of-way through Zeigler's irrigation ditch for the purpose of conveying water to Cocanougher's property. The Supreme Court found that the proposed use must be *more necessary* if the effect of granting the succeeding public use condemnation will completely deprive the first owner of the first owner's use. The requirement for a *more necessary* public use does not preclude condemnation for a joint use that will not interfere with the existing use. This rationale was followed in Montana Talc Company v. Cyprus Mines Corporation, 229 Mont. 491, 748 P.2d 444 (1987), concerning competing mining interests, and Montana Power Company v. Burlington Northern Railroad Company, 272 Mont. 224, 900 P.2d 888 (1995), concerning locating a power line within a railroad right-of-way. In Montana Talc, the District Court issued a summary judgment finding that an open-pit excavation on the land of another for the purpose of mining an ore body on adjacent land was not an authorized public use and that the talc company could not show that the open-pit excavation was a more necessary public use. The Montana Supreme Court reversed the District Court and found that the open-pit excavation necessary to backslope the mining of an ore body is a public use. The Court also stated that the right of condemnation, once a public use is determined, cannot be delimited by section lines, fences, or different ownership. All real property belonging to any person can be taken to satisfy the public use. The Court cited Butte, Anaconda & Pacific for the proposition that the public welfare is the base upon which the correct application of the doctrine of eminent domain rests. The right of eminent domain may be of the greatest value to a corporation that may exercise its privileges, but that is an incident that must be subordinated by the courts to the question of public use and to the consideration of the benefits that accrue to the public by the construction of the contemplated project. The Court also found that a *more necessary* use does not mean a different use in all cases. The case was remanded to the District

Court for a determination of whether a joint operation was feasible that would safeguard the rights of each party and accommodate the public good through both public uses.

As demonstrated, the Montana courts have had ample opportunity to consider the issue of *necessity* in eminent domain cases. However, the same is not true with regard to the issue of whether a taking is in the *public interest*. I previously indicated that the dearth of litigation may be because the introductory clause of section 70-30-111, MCA, provides that before property can be taken, the condemnor is required to show by a preponderance of the evidence that the *public interest* requires the taking based on findings that the use is authorized by law, that the taking is *necessary* to the use, and that an effort to obtain the interest sought to be taken was made by submission of a written offer that was rejected. The question of whether a use is authorized by law is satisfied by citing the statutory authority enumerating the proposed use as a public use. It is also easy to show that a written offer was made and rejected. Therefore, the only issue that is generally subject to dispute is the issue of *necessity*. Yost is the one case that does discuss the *public interest* requirement contained in section 70-30-206(2), MCA. In Yost, the state sought to condemn land for a frontage road. At the trial, the state introduced its "amended resolution condemnation order" and then rested its case. Yost then introduced evidence that the 7-mile route would parallel the existing interstate highway, that the locality was already served by an existing network of roads, that the purpose of the project was to provide access to the interstate highway, that the proposed frontage road would not provide more access than existing county roads, that the proposed frontage road would not benefit the public, that the cost of the project was approximately \$50,000 per mile, and that the proposed frontage road would disrupt Yost's farming practices. The state did not offer any rebuttal evidence, apparently believing that the resolution adopted by the Highway Commission was sufficient to establish the state's case. The District Court found that the taking was not *necessary*. On appeal, the Supreme Court noted that not only is the District Court required to determine the question of *necessity*, but it is also required to make a finding that the *public interest* requires the taking of lands before a preliminary condemnation order is issued. The Supreme Court noted that in the 1961 revision of eminent domain statutes, the Legislature had not amended the precursor of section 70-30-206(2), MCA, requiring a finding that the proposed taking is in the *public interest*. The Supreme Court noted that the Highway Commission resolution merely created a disputable presumption of *necessity* and concluded that the District Court judge had the authority to deny *necessity* based upon the evidence presented.

In summary, in order for a condemnor to establish that a taking is *necessary*, the condemnor must introduce evidence that the proposed taking is reasonably requisite and proper for the accomplishment of the purpose for which the property is sought under the particular circumstances of each case. The type of evidence introduced will vary depending upon the type of project for which the property is sought. Once the condemnor has introduced sufficient evidence to establish *necessity*, the burden shifts to the person opposing the taking to show by clear and convincing evidence that the condemnor's action is excessive or arbitrary. The

question of whether a taking is *necessary* is a question of fact that is generally determined by the court. In those limited instances in which the Legislature has delegated the finding of *necessity* to another entity, the finding is a political decision that will not be overturned by the courts unless the party opposing the taking shows that the finding is arbitrary. The determination of arbitrariness must be established by clear and convincing evidence.

Under section 70-30-111, MCA, once the condemnor establishes by a preponderance of the evidence that the use is authorized by law, that the taking is *necessary* for the use, and that an effort was made to obtain the property sought to be taken by a written offer that was refused by the property owner, the *public interest* authorizes the property to be taken. However, prior to issuing a preliminary condemnation order, the District Court judge is required to make a finding that the taking is in the *public interest*. That finding must also be supported by a preponderance of the evidence.

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